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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

**TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS**

**BEFORE THE HONORABLE AMY TOTENBERG**

**UNITED STATES DISTRICT JUDGE**

**OCTOBER 20, 2021**

**4:02 P.M.**

***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

***TRANSCRIPT PRODUCED BY:***

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UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

**FOR THE PLAINTIFFS DONNA CURLING, DONNA PRICE, JEFFREY  
SCHOENBERG:**

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WILLIAM DIGGES, III, AND RICARDO DAVIS:**

NO APPEARANCE

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**FOR THE FULTON COUNTY DEFENDANTS:**

NO APPEARANCE

**P R O C E E D I N G S**

**(Atlanta, Fulton County, Georgia; October 20, 2021.)**

THE COURT: Okay. This is Judge Totenberg. Good afternoon.

MR. MILLER: Good afternoon.

THE COURT: So the questions that were being posed to the witness, Mr. Schoenberg, regarding some sort of advocacy, what in particular were they -- what information -- excuse me -- were they seeking in particular?

MR. MILLER: Your Honor, this is Carey Miller on behalf of the State defendants. I was taking the deposition there.

As far as information I was seeking in particular, I don't mean to argue with the question. But it is a little difficult to state that precisely because the questioning never proceeded to that extent.

But in terms of kind of the big picture and where it fits into this case, Your Honor, the intent here was to gauge, first of all, in terms of motivation of a plaintiff, whether that is motivated as far as the system itself or otherwise for other reasons for impeachment purposes. But also more acutely relative to the position of the case right now is to explore this concept of generalized grievances and concerned bystanders that are seeking to impose value judgments -- using those as a vehicle.

1           And, Your Honor, I understand you have a copy of the  
2 deposition transcript with you. If it would be appropriate, I  
3 could point you to a couple of the initial questions on the  
4 topic. If you prefer otherwise, I'll --

5           THE COURT: All I have is two pages.

6           MR. MILLER: Okay. Your Honor, I think --

7           THE COURT: Was there more?

8           All right. Could you tell us which pages you want  
9 to -- or else you can read me -- read it to me. Because it was  
10 150 pages, and I have not looked at it in that context.

11          MR. MILLER: Sure. I understand that, Your Honor.

12          It was a text file. It is a little difficult to  
13 navigate. But I will point you to starting at Page 26 in the  
14 text file. It is going to be difficult to find by pages of the  
15 PDF.

16          THE COURT: Well, why don't you tell me what you were  
17 asking. And then you can send us the page numbers when we're  
18 through with this.

19          MR. MILLER: Okay. Yes, Your Honor. So  
20 Mr. Schoenberg testified regarding -- the question was  
21 regarding informal political works that he mentioned engaging  
22 in. And I posed the question, can you describe that kind of  
23 political work to me?

24          He went on to explain that I've been on campaigns,  
25 two or three, informally as a consultant. And that people,

1 friends of mine, positions of authority, will call me and ask  
2 me my advice on things.

3 The follow-up to that statement -- the question  
4 was -- and this is quoting from Page 27 of the rough -- now,  
5 you mentioned earlier that friends of authority or in positions  
6 of authority will call and ask you advice. Have those calls  
7 ever concerned elections in Georgia?

8 At that point, an objection was posed from Ms. Elson.  
9 Quoting from the transcript, I'll jump in here. I think you  
10 are inquiring into matters the defendant agreed not to pursue.  
11 You indicated we wouldn't be responding to correspondence.

12 I ask Ms. Elson to state the objection and we would  
13 move along. The next statement was Ms. Elson instructing the  
14 witness not to answer questions about his legislative  
15 activities.

16 THE COURT: And were any of these questions about  
17 advocacy as to the voting system, or was it about general  
18 advocacy about anything -- anything at all that was --

19 MR. MILLER: Your Honor, the questions posed were  
20 regarding the elections and election administration. I'll read  
21 you the next question that follows what I just read to you.  
22 And this is on Page 28, Line 3.

23 The question is: Mr. Schoenberg, let me ask you this  
24 way. Those friends in positions of authority that you've  
25 called and talked to have asked for your advice, did it ever

1 concern the administration of elections and election technology  
2 in Georgia?

3 Again, there was an instruction not to answer.

4 THE COURT: And so were any of the questions though  
5 about the election -- election as a whole rather than election  
6 administration? Because you said elections and election  
7 administration.

8 Elections are a much broader -- obviously a much more  
9 broader politicized subject.

10 MR. MILLER: That's correct, Your Honor. And when I  
11 was rephrasing that question there, the intent was to narrow it  
12 there. And in that question, it was concerning the  
13 administration of elections and election technology in Georgia.

14 THE COURT: Okay. All right. And who is going to be  
15 speaking on behalf of plaintiffs?

16 MR. CROSS: This is David Cross, Your Honor.

17 THE COURT: All right. I understood from the short  
18 communication I received that your concern was that this wasn't  
19 relevant because the standing of the Curling plaintiffs wasn't  
20 resting upon the same organizational interest that the  
21 Coalition's was.

22 But as you know, anything that could lead to  
23 discoverable evidence, generally speaking, would be proper  
24 subject absent a compelling First Amendment privacy concern.

25 So I'm trying -- what was the basis of the objection?

1 MR. CROSS: Yes, Your Honor. The objection -- and  
2 this was a part when Mr. Miller was reading the transcript he  
3 didn't read what Ms. Elson actually said. She went on to say  
4 that the basis for the instruction -- I'm just getting back to  
5 it. She said that would be an objection to relevancy and  
6 protected speech.

7 So we are to go to two bases during the course of the  
8 deposition. The relevance, Your Honor, is we don't see it.  
9 And I don't believe Mr. Miller has articulated it.

10 We actually have had a lot of meet-and-confers on  
11 this particular issue in the context of discovery when they  
12 sought documents -- and there may have been some  
13 interrogatories. But certainly there were document requests  
14 that got to the same sort of thing.

15 And we have always maintained that this is  
16 off-limits. And when we have asked them to articulate the  
17 relevance, we get what you got today, which is some vague  
18 notion of motive. I'm not sure how the motive here has any  
19 bearing upon the constitutionality of this system or their  
20 standing. And their motive is not in question.

21 It is certainly public knowledge that our clients  
22 have engaged in some legislative activities to remedy the  
23 problems that they see with the election system. One of the  
24 ways they have sought to do that is trying to get hand-marked  
25 paper ballots. That motive is clear. It is public record.



1 And we don't dispute that.

2           What they want to do with the questioning is to dig  
3 into the specifics of those communications with members of the  
4 legislature, with other activists, with members of the  
5 executive branch. And that concern, Your Honor -- it is not  
6 only irrelevant, but it runs head-long into what we believe the  
7 First Amendment privilege is intended to protect, which is to  
8 avoid chilling that type of behavior.

9           If our clients as activists -- and unlike the State,  
10 we don't think activist is a pejorative term. If they have to  
11 be concerned that any communications they have in exercising  
12 their First Amendment rights are going to be the subject of  
13 cross-examination by the current government, by an agent of the  
14 State, then that is going to chill their activity. It is going  
15 to become concerning to them, and they are going to face  
16 potentially retaliation. And we have seen retaliation in the  
17 context of this particular litigation. So I think it is a  
18 legitimate concern.

19           And I will say the standard, Your Honor, articulates,  
20 you know, the reasonable -- the likelihood to lead to  
21 reasonable evidence. You know, Federal Rule 26, as Your  
22 Honor -- I know you know this. But it has been narrowed in the  
23 scope of discovery and is really focused on, you know, what is  
24 relevant to a claim or defense and more particularly what is  
25 relevant to a fact of consequence.

1           This does not bear on any fact of consequence as to  
2           whether this system is constitutional and whether our clients  
3           are individually harmed by having to use this or use the  
4           burdensome alternative of absentee ballots.

5           And we have not heard any relevance for it. And I  
6           would submit any relevance is so nominal it is drastically  
7           outweighed by the potential harm of invading communications  
8           that have been protected by the First Amendment.

9           THE COURT: Well --

10          MR. CROSS: One last thing on this, Your Honor, I  
11          should point out. We did allow -- if you go to Page -- I think  
12          it is 37 -- let me just get there real quick. I think this  
13          gets to the question you were asking.

14          There was a question of -- and this is a rough. So  
15          I'm not sure -- the way the question is phrased is, have you  
16          engaged with any advocacy can federal electronic voting system?  
17          I don't know exactly -- since it is a rough, we don't have the  
18          exact wording.

19          But the question as I recall as captured here was  
20          whether Mr. Schoenberg engaged in advocacy specifically  
21          regarding the federal electronic voting system. And he  
22          answered that no.

23          THE COURT: I'm sorry. I didn't understand what you  
24          were saying. The question was --

25          MR. CROSS: I'm sorry.

1 THE COURT: -- what again?

2 MR. CROSS: He was -- yeah. Sorry, Your Honor. He  
3 was asked a question about whether he engaged in political  
4 advocacy regarding the federal electronic voting system.

5 I'm not sure exactly what -- my recollection of the  
6 question that he was asked -- allowed to answer yes or no was  
7 whether he engaged in political advocacy regarding the  
8 electronic voting system specifically in some way. He answered  
9 that no.

10 Unfortunately, we don't have the precise wording  
11 because it is a rough transcript. So there was not an outright  
12 instruction on every question. And we think the record shows  
13 that to the extent that he engaged in political advocacy, like  
14 Ms. Curling and Ms. Price, it doesn't have anything to do with  
15 the issues in this case and the constitutionality of the BMD  
16 system that is in place and whether that harms our clients.

17 MR. MILLER: Your Honor, if I may, I'm on the page  
18 that Mr. Cross was referring to. Just before then, the  
19 question posed was, quote, have you engaged in any legislative  
20 advocacy or advocacy with the executive branch of state  
21 government regarding Georgia's electronic voting system?

22 The answer was yes.

23 The next question was, and can you describe that to  
24 me?

25 The next interaction was an instruction not to

1 answer.

2           The subsequent question Mr. Cross is referring to --  
3 and he is correct. This is a rough. I can inform the Court as  
4 to what the question was aimed to get at was similar to the one  
5 I just read, which is to say advocacy with a legislature,  
6 executive branch of the federal Government. I recognize with a  
7 rough transcript we have got a few gaps here. But that was the  
8 intent at least.

9           So back to the central issue, Your Honor, they are  
10 stating yes, we engaged in this advocacy. But a simple  
11 question of can you describe this to me, they are instructing  
12 him not to answer.

13           And, Your Honor, I'll dispense with the relevance  
14 issue here pretty quickly because I don't think that is  
15 reasonably in dispute. In their complaint, they allege at  
16 various points dereliction of duty of office holders and office  
17 holders' knowledge. And, of course, that knowledge comes in  
18 part at least from constituent service interactions and  
19 certainly makes this relevant.

20           But setting all that aside, Your Honor, the  
21 description of relevance that Mr. Cross just offered I think is  
22 in contradiction to the descriptions that were offered when Mr.  
23 Cross was seeking discovery from my clients.

24           I don't believe the relevance is reasonably in  
25 dispute right now. Instead, it is this instruction not to

1 answer on the issue entirely.

2 And, Your Honor, with respect to the type of things  
3 we're asking about here, you know, frankly, I think it is  
4 absolutely relevant when Mr. Cross referenced the co-plaintiffs  
5 and their advocacy. And it is absolutely relevant to know has  
6 Mr. Schoenberg or other plaintiffs in this case engaged in that  
7 advocacy with the state. That question was answered.

8 What was the advocacy? Were they seeking opposition  
9 to House Bill 316? I assume so. I don't know that though  
10 based off of the record for the Curling plaintiffs at least and  
11 certainly for Mr. Schoenberg.

12 THE COURT: I didn't understand --

13 MR. CROSS: Your Honor --

14 THE COURT: Just a second.

15 Mr. Miller, what were you saying about the  
16 dereliction of duties? I didn't understand what you were  
17 trying to convey to me about the allegation of -- how the  
18 allegation as to dereliction of duties relates to this.

19 MR. MILLER: Your Honor, frankly, I'm speaking on my  
20 recollection of the complaint right now. I don't have the  
21 exact -- notes exactly in front of me. But throughout the  
22 complaint, there are allegations made as to our clients'  
23 awareness of this issue, their awareness that the BMDs could  
24 never be secured, their awareness that a hack was imminent,  
25 their awareness that, frankly, it is just a bad policy

1 decision. And that is where the complaint kind of goes at  
2 this.

3 But from a bigger picture perspective, Your Honor, it  
4 simply gets back to the meat of the issue that I mentioned at  
5 the outset of the call, which is a central portion of State  
6 defendants' dispute regarding the plaintiffs' standing is that  
7 what we're talking about here is a generalized grievance about  
8 the conduct of the government being conducted according to law.

9 And this goes exactly to that nature. If this can be  
10 accomplished, you know, by legislative advocacy, that is  
11 certainly relevant to that claim.

12 You know, I'm certain Mr. Cross will dispute its  
13 weight; would dispute, you know, perhaps on other grounds  
14 admission.

15 But as far as relevance in obtaining that information  
16 in discovery, Your Honor, I respectfully submit I don't think  
17 that is reasonably in dispute here.

18 THE COURT: Okay. I interrupted you, Mr. Cross.  
19 What were you trying to say?

20 MR. CROSS: Yes, Your Honor. This is David Cross. I  
21 guess briefly on the relevance point, the new argument we're  
22 hearing now, which is not an argument we have heard before, is  
23 this goes to the knowledge of the state actors. Because not  
24 only is that an entirely new argument, but to say that now  
25 their defense is that the State is relying on our clients to

1 inform them of whether the election system is secure strains  
2 credulity.

3 And, again, since it has never been articulated  
4 before, it seems clear that is not the motivation behind these  
5 questions. In any event, that seems an awfully thin read to  
6 examine our clients on questions that go to the substantive --  
7 their political activity. And in particular these questions  
8 are not just about communications with the Secretary of State's  
9 office in this case. But broadly about anyone in any position  
10 of authority is the vague capture of the question. And that  
11 goes well beyond even what Mr. Miller is now arguing.

12 The last thing I will say is: I cannot understand  
13 this argument that this has anything to do with whether it is a  
14 generalized grievance. The fact that some of our clients or  
15 all of our clients may be exercising their First Amendment  
16 right to try to get change through the legislature that is  
17 similar to the change they are trying to get in this court has  
18 nothing to do with how the election system when they are  
19 voting -- whether that has an impact on them and whether that  
20 impact is particularized to them.

21 What I hear from Mr. Miller is what we here in all of  
22 our discovery conferences, which is the conclusory argument,  
23 well, of course, it is relevant, it is absolutely relevant.  
24 But that is not an argument. That is not an articulation of  
25 fact. It is not an identification of any fact of consequence

1 in this case.

2 And so this is not an issue we wanted to burden the  
3 Court with. But we are very concerned that we have clients who  
4 are activists who regularly engage in exercising their First  
5 Amendment rights and we have an agent of the State that wants  
6 to explore deeply into those communications.

7 And we have not been able to work on any limit on  
8 that in the prior meet-and-confers. We are just told it is all  
9 relevant, it is absolutely relevant, and we're entitled to know  
10 who they are talking with, what they are saying, what they are  
11 hearing, what their positions are, what their rationale is.

12 And that is an invasion that we think is not  
13 warranted and, again, does not bear on any fact of consequence.

14 MR. MILLER: Your Honor, if I may just pose one  
15 additional thought here. Mr. Cross just discussed kind of the  
16 heart of this issue.

17 The plaintiffs are advocates for hand-marked paper  
18 ballots. And that is completely fine as a policy matter. You  
19 know, what they want to persuade their elected officials to do  
20 is completely fine as a policy matter.

21 Of course, it is also relevant to the litigation they  
22 brought as plaintiffs to seek to impose their policy -- their  
23 preferred policy as a matter of constitutional law.

24 And, Your Honor, with respect to the, you know,  
25 private meet-and-confers -- prior meet-and-confers, I can't say



1 I can speak with any specificity as to exactly which  
2 meet-and-confer Mr. Cross was referring to. But I will, of  
3 course, remind -- Your Honor is, of course, aware of frankly  
4 our disagreement in the discovery process. And rather than  
5 burden the Court with additional joint discovery statements and  
6 demand answers to these -- or productions from these documents  
7 that we're getting stonewall refusal on, we decided to explore  
8 the topic in a deposition so that maybe the deposition could  
9 inform a more narrowed discovery request. And at this point,  
10 we're unable to do it.

11 Your Honor, I would just revert back once more to  
12 kind of the central issue here. You know, as far as a  
13 relevance objection, not only do I not think it is not  
14 reasonably in dispute, but, of course, that is not a proper  
15 instruction to give a witness not to answer a question.

16 Now, to the extent there is a privilege applicable  
17 and the First Amendment privilege is what the plaintiffs are  
18 seeking to use to protect this information, it is their duty to  
19 make the prima facie showing that their associational rights  
20 will be chilled.

21 Your Honor, I don't think we're there. And if the  
22 question is would we subject this portion of the deposition to  
23 Your Honor's protective order, certainly.

24 You know, this is not -- I'll put it this way. Mr.  
25 Cross's argument may make -- may carry more water if we were

1 discussing a non-plaintiff member of the Coalition who we  
2 subpoenaed for a deposition and sought to produce documents.

3 That is not what we're discussing here. We're  
4 discussing a plaintiff who brought this litigation who  
5 presumably had a basis for doing so. And we want to explore  
6 his motive for doing so.

7 THE COURT: So let me ask you this, Mr. Miller. I'm  
8 going to then revert to asking some questions of Mr. Cross.

9 Why is their motive for -- their motive I can see  
10 would be relevant if they really were -- relative to I feel  
11 impacted by this, I don't feel like I can properly cast a  
12 ballot.

13 But presumably what you are trying to do at the  
14 moment, I guess, is elicit answers that would indicate that  
15 their true motive is change of the balloting system and that  
16 everything else is false.

17 But the thing is: It could be both true; right?  
18 What does it matter? What does it matter if it is a combined I  
19 don't feel this -- that my vote is secure and at the same time  
20 I would like to obtain -- I would like the State to adopt a  
21 better or different balloting system?

22 MR. MILLER: Sure. Your Honor, so I will address  
23 that. I guess a couple of initial thoughts come to mind there.

24 First, Your Honor, you are exactly right. It could  
25 be a combination of the two motives. And that is something

1 that I think is relevant to exploring, if not else, for  
2 impeachment purposes.

3 Second, Your Honor, I would also point to  
4 Mr. Schoenberg's, you know, testimony that he did offer about  
5 his position with the Secretary of State candidate. I do not  
6 have the exact text in front of me. But something along the  
7 lines of one of the primary issues in that campaign was on  
8 election systems, whether to move to hand-marked paper ballots  
9 or not. And that was offered.

10 He told us that was a central issue of the campaign  
11 for which he served as a treasurer. And to see if he pursued  
12 that through other means, we're being carte blanche told we  
13 can't by the defending counsel.

14 So in sum, Your Honor, I think the relevance comes  
15 into play of first of all just general impeachment purposes.  
16 Of course, we will want to cross-examine the witness if there  
17 is some ulterior motive that goes to this issue rather than  
18 actually securing the election.

19 But separate from that, Your Honor, it simply goes  
20 to, frankly, this is a -- this is a political debate, not a  
21 federal constitutional claim.

22 MR. CROSS: Your Honor --

23 THE COURT: Well, I guess I'm not -- if it is a  
24 political debate, I'm not sure the fact that the plaintiff has  
25 some views about this makes -- I don't understand why that

1 helps the State's defense of this.

2 I mean, I -- I thought you want to take these --  
3 pursue this line of questioning to see or something -- some  
4 line of questioning against these individual plaintiffs to  
5 establish that they didn't have standing.

6 And I'm just -- I'm just not really clear how -- how  
7 pursuing all of the different things that they may have done in  
8 order to change or to improve the balloting system ultimately  
9 addresses that since they are not -- they are not claiming  
10 systemic organizational standing.

11 MR. MILLER: Yes, Your Honor. And that is right.  
12 You know, we have been discussing largely the weight of  
13 evidence in terms of the merits.

14 But with respect to standing, Your Honor, it goes to  
15 the -- and I believe it was from the *Gardner vs. Mutz* case  
16 about the -- it is also referenced in the *Lin Wood* case and in  
17 *Bodnar* about simply converting your policy position into a  
18 federal constitutional claim that is not a particularized  
19 concrete injury.

20 Your Honor, of course, at succeeding stages of the  
21 litigation, the plaintiffs have to prove up their standing at  
22 each stage as is required. So at the initial pleading stage,  
23 of course, we could make these sort of assertions but wouldn't  
24 be there. But, Your Honor, at this point, we're in discovery.  
25 We expect the plaintiffs will put up evidence -- I would

1 anticipate they would put up evidence to go to the  
2 particularized injury issue. And we, likewise, feel entitled  
3 to obtain discovery on evidence that undercuts that or that  
4 supports our argument.

5 And, Your Honor, I guess as to the central issue, you  
6 know, there's the two-layer issue of the relevance, which is as  
7 it goes to the standing that I just discussed or to the weight  
8 that we discussed previously. But even still, that relevance  
9 objection is not a proper basis on which to instruct a witness  
10 not to answer a question.

11 THE COURT: I agree. I agree with that.

12 MR. MILLER: Okay. And, Your Honor, the only proper  
13 basis then would be a privilege assertion. And I have yet to  
14 hear the prima facie application of why it applies, why it  
15 would be reasonably likely to chill speech.

16 But even still, at least under the Ninth Circuit --  
17 frankly, I have not come across an Eleventh Circuit case  
18 addressing it in this context as opposed to, for example, a  
19 reporter's confidential sources but, you know, a host of  
20 factors that can be considered and if there is a way to guard  
21 against, you know, chilling the First Amendment privilege.

22 And, Your Honor, I would respectfully submit that if  
23 we subject the portion of the deposition discussing this to  
24 Your Honor's protective order then that rids that issue.

25 THE COURT: Well, I think -- let me just hear now

1 from Mr. Cross, and then I'll share some of my own thoughts  
2 unless -- so let me hear from Mr. Cross.

3 What were you trying to say?

4 MR. CROSS: Sure, Your Honor. Thank you. On the  
5 issue of the instruction, the instruction was based on the  
6 First Amendment privilege, which we think is a legitimate basis  
7 to instruct. That is a recognized privilege. The courts have  
8 recognized it is a privilege that is appropriate to decline  
9 discovery.

10 THE COURT: So you -- I understand that it is a  
11 legitimate basis.

12 But you are asserting that the counsel did assert a  
13 First Amendment privilege objection?

14 MR. CROSS: Yes, explicitly. And that is at -- let  
15 me just come back to it. I think it is Page 27. It is the  
16 portion --

17 MR. MILLER: Your Honor, this is Carey Miller. Mr.  
18 Cross is referring to the portion he read earlier. It is  
19 shortly after what I read to you when we first got on the call.  
20 And I state on Line 9 of Page 27, do you want to state your  
21 objection? We'll move along, rather than speaking objections.  
22 Ms. Elson says, sure. That would be an objection to relevancy  
23 and just protected speech. It is improper questioning.

24 THE COURT: Okay. All right.

25 MR. CROSS: Right. And that was articulating the

1 First Amendment privilege is protected speech, Your Honor. So  
2 both objections were asserted to preserve them. The  
3 instruction was based on the privilege assertion. And had the  
4 questioning persisted, we would have contacted the Court. We  
5 didn't do that because Mr. Miller indicated he was going to do  
6 that.

7 So that is how we ended up here. I think the  
8 relevance argument is well within the Court's discretion since  
9 we are here now addressing this issue.

10 And on that, I will say that Mr. Miller keeps coming  
11 back to impeachment. I don't understand what he is talking  
12 about because he's not offered what the impeachment is. There  
13 is no suggestion of inconsistent testimony or positions here.

14 In fact, what he seems to be saying is he wants to  
15 show that our clients have been entirely consistent in always  
16 seeking to remedy this -- the issues they see with the election  
17 system, both the DREs and now the BMDs, and have exhausted  
18 every means that they can think to do that from the legislature  
19 to the courts.

20 So it is the opposite of impeachment. If he wants to  
21 say their motive is and has always been that they are not happy  
22 with the election system because they find it unreliable and  
23 that they want hand-marked paper ballots, that is not  
24 impeachment. It is the opposite.

25 So I honestly don't know what he is talking about.

1 And he has not identified any inconsistency that he can even  
2 imagine.

3 And then I would say, Your Honor, they keep saying  
4 that our lawsuit seeks hand-marked paper ballots. And I guess  
5 what he wants to say is the motivation of our clients is that  
6 what they want in this lawsuit is hand-marked paper ballots.

7 And that is not what the lawsuit says on its face.  
8 Hand-marked paper ballots are part of the relief that they  
9 would like to have. But as they have explained many times,  
10 what they are ultimately after is a reliable election system  
11 but more importantly eliminating the current system that is  
12 unreliable.

13 Your Honor's injunction on the DREs our clients have  
14 always considered a win, even though it didn't give them a new  
15 system, because it gave them the fundamental relief that they  
16 are seeking, which was to eliminate that system. And that is  
17 what they are seeking now.

18 Again, if Mr. Miller wants to establish that in their  
19 ideal world they would also get hand-marked paper ballots,  
20 well, that is not in dispute. They will testify to that. He  
21 does not need to get into any communications with the  
22 legislature or the executive office of the state to establish  
23 that in their ideal world they would like that.

24 But that is not the only relief they are seeking.  
25 So, again, there is no inconsistency or no impeachment.



1           And then the last thing I would say, Your Honor, this  
2       notion of policy positions -- he says that that bears -- that  
3       would be their defense to the facts that we would put on of an  
4       individualized harm. Again, I just don't know what that means.

5           If our clients can put forth facts that show that  
6       they are harmed at a particularized level as required by the  
7       law when they vote in this system, I don't honestly know what  
8       he means when he says their motive or their policy position  
9       would somehow refute that.

10           Regardless of what their motives are and regardless  
11       of what their policy positions are, if the facts show that they  
12       are harmed, then that is what they show. And so it just --  
13       this is all sort of a lot of handing-waving to invade protected  
14       speech.

15           And I guess I don't know what else to say because I  
16       really fundamentally don't understand Mr. Miller's argument.  
17       It is just a complete disconnect between the notion that what  
18       they have done in the legislative sphere somehow has bearing,  
19       much less refutes factual determinations that will be decided  
20       on their experience in voting in the system.

21           THE COURT: Well, let me ask you this.

22           MR. MILLER: Your Honor --

23           THE COURT: Let me just ask Mr. Cross something now.

24           Just following the ruling of *NAACP vs. State of*  
25       *Alabama* -- old case but still very valid case dating back to

1 1958.

2 Tell me: Are you prepared to address in an  
3 affidavit -- your clients to address in an affidavit that  
4 compelled disclosure will chill their associational rights and  
5 that there is an objective reasonable probability of that  
6 occurring?

7 MR. CROSS: Yes, Your Honor. We absolutely can do  
8 that.

9 THE COURT: And not do this just simply on a  
10 generalized basis?

11 MR. CROSS: I'm sorry. Can you -- I didn't  
12 understand the question.

13 THE COURT: And they would be prepared to do this not  
14 just on a generalized basis but based on their own  
15 individualized experience as well?

16 MR. CROSS: Yes. My understanding is yes, Your  
17 Honor.

18 I mean, we have discussed this at length with them.  
19 The concern that we hear from our clients is that because they  
20 do remain active on issues regarding election security and  
21 other things and issues beyond that, if the substance of their  
22 communications with fellow activists, the legislature, and  
23 others, as Mr. Miller put it, with people in positions of  
24 authority suddenly become discoverable to the State, they are  
25 not going to be able to work as activists. No one is going to

1 associate with them on these issues. Because as soon as it  
2 becomes clear that all of these communications can potentially  
3 become discoverable in this or related litigation, particularly  
4 when they file litigation to pursue, you know, the same sort of  
5 rights that they are seeking to protect in the legislative  
6 sphere, then they are crippled. That is exactly the sort of  
7 First Amendment protection and chilling that I think the  
8 privilege is intended to protect. That they are just going to  
9 be iced out. They will be isolated. That is what I hear from  
10 my clients.

11 Because how can people feel comfortable emailing with  
12 them, including them in meetings, having the sort of, you know,  
13 deliberative process and advocacy they need to engage in if the  
14 fear is that one of the people in that group, you know, decides  
15 to file a lawsuit to pursue their rights and suddenly all of  
16 those communications become discoverable to the State?

17 THE COURT: Okay. Well, you can point, Counsel, even  
18 though it is not exactly, to say the least, on all fours -- but  
19 it reviews this area of the law, *Flynn vs. Square One*  
20 *Distribution*, 2016 Westlaw 2997673. And this discussion occurs  
21 at -- starting at Page 2 going through Page 3.

22 I know the depositions are supposed to continue  
23 tomorrow. And if they could continue -- I'm not going to rule  
24 first thing at 9:00 in the morning for you. So -- but you can  
25 file the affidavits under seal. They should address the sorts

1 of -- you know, with specificity what they're talking about to  
2 properly assert the privilege.

3 And then the burden would shift to the opposing party  
4 to demonstrate a compelling need for the requested information.

5 Now, I haven't really heard that compelling need,  
6 frankly. I think, you know, the more simple thing is  
7 realistically that either -- that there is or is not standing  
8 based on the harm that they actually are -- these individuals  
9 are asserting and is it generalizable, as the State has  
10 consistently said, and completely basically controlled by the  
11 *Lin Wood* cases or not.

12 I don't think it will make a difference -- all this  
13 other stuff. But if the plaintiffs are going to assert the  
14 privilege and they want to understand this -- the defendants  
15 think that somehow it would be relevant to their defense, I'm  
16 not going to -- I think I at least have to have a properly  
17 asserted privilege in front of me so that I understand what  
18 I've got here.

19 If you want to proceed with your depositions tomorrow  
20 all but this area, then you may do so. Just avoid discussing  
21 this specific area. And then you would resume on anything  
22 else, if necessary. And you could do that obviously by remote,  
23 if necessary.

24 MR. CROSS: Your Honor, this is David Cross. Just to  
25 clarify, are you giving us the option to proceed tomorrow or

1 you are telling us we need to proceed tomorrow regardless?

2 THE COURT: Well, I think that is sort of the -- it  
3 really kind of depends on your schedule.

4 I mean, let me just say this: I have a trial that  
5 begins on Friday. We'll give it priority attention. But even  
6 if you filed it tonight, I don't think we would give you an  
7 order tomorrow morning at 9:30 in the morning. That is just  
8 not what -- I just don't have that capacity.

9 MR. CROSS: Right.

10 THE COURT: So if y'all can find a different date  
11 next week, sure. That is a possibility. But -- and I can  
12 understand the utility of that. But that is up to you-all to  
13 decide.

14 And if you want to talk about it while I'm present,  
15 I'm happy to do so. Or if you want to go offline and talk  
16 about it together, that is fine too.

17 Why don't you take five minutes to discuss it, and  
18 we'll just be offline for five minutes. Okay?

19 MR. CROSS: Your Honor, this is David Cross. We  
20 should -- the parties should stay on this line and talk and  
21 then you'll come back?

22 THE COURT: In five minutes, yes.

23 MR. CROSS: All right.

24 MR. MILLER: Thank you, Your Honor.

25 THE COURT: You're welcome.

1                                   **(There was a brief break in the proceedings.)**

2                   THE COURT: All right. This is Judge Totenberg  
3 again. Are y'all ready to talk?

4                   MR. CROSS: Yes, Your Honor. This is David Cross.

5                   We were not able to reach a compromise. But we  
6 did -- Mr. Miller was on. We did agree to postpone the  
7 depositions as long as we can get them back on the schedule in  
8 relatively short order so Your Honor can resolve this.

9                   THE COURT: Okay. Can you get -- use the time you  
10 are here to draft an -- to work on the affidavits and get them  
11 to us as soon as possible?

12                   I just think my attention span for this is going to  
13 disappear. Jury selection starts on Friday.

14                   MR. CROSS: Yes. Your Honor, could we have until --  
15 I want to make sure we can realistically do this. What is the  
16 latest that we could get them to you tomorrow without putting  
17 you in a bind?

18                   THE COURT: 4:00.

19                   MR. CROSS: Oh, okay. We'll shoot for the morning.

20                   THE COURT: Very good. That is certainly better.

21                   MR. CROSS: We'll get them as early as possible.

22                   THE COURT: Yes.

23                   MR. CROSS: Could I raise one other issue while we  
24 have you briefly?

25                   THE COURT: Yes.

1 MR. MILLER: Your Honor, before we change subjects,  
2 could I just address the filing issue?

3 THE COURT: Yes.

4 MR. MILLER: And my simple question here was: I  
5 don't anticipate we're talking about extensive briefing or  
6 anything of that nature.

7 THE COURT: No.

8 MR. MILLER: But the State would like an opportunity  
9 to respond, you know, once the showing and articulation of the  
10 privilege is made and, frankly, to respond as to the mitigating  
11 factors and things we think can work around as to any potential  
12 harm.

13 THE COURT: All right. Well, then let's say that --  
14 let's do it this way.

15 Mr. Cross, you get your materials in by -- can you  
16 get your materials in by 1:00 P.M.?

17 MR. CROSS: Yes, Your Honor.

18 THE COURT: Okay. And then can the State get your  
19 response in by noon the next day?

20 MR. MILLER: Yes, Your Honor. That will be fine.

21 THE COURT: So you would need to address why you have  
22 a compelling need for the requested information I have heard  
23 you speak. You don't need to go at length. But if -- you have  
24 to be specific as to that if you really are going to contend  
25 that you have a compelling need for the requested information

1 and alternatively yes, you can address the other items that you  
2 mentioned.

3 And, Mr. Cross, to the extent you have heard  
4 Mr. Miller identify what he thinks are reasonable alternative  
5 ways of addressing your concerns, you should probably address  
6 that as well in your submission -- your -- do a cover  
7 submission. Okay?

8 MR. CROSS: Yes, Your Honor.

9 THE COURT: All right. We'll look for that. Thanks  
10 very much.

11 We'll try to get you out something but I don't -- on  
12 Friday, but it may be Monday.

13 MR. CROSS: Your Honor, one other quick issue if I  
14 may.

15 THE COURT: Yes.

16 MR. CROSS: The DRE issue that Mr. Miller raised in  
17 his argument, we withdrew the instruction on that to avoid  
18 burdening the Court with it. But I did want to raise it  
19 because we do have a concern that the bulk of yesterday's  
20 deposition focused on examination about the DREs going back to  
21 the original complaints and declarations predating even the  
22 injunction. And that was a heavy focus of -- I would say it  
23 was more than half the day.

24 We are concerned -- given that the State has taken  
25 the position that DREs are out of the case and have not



1 provided discovery on DREs, we don't think our clients should  
2 have to sit through depositions that are spending literally  
3 hours on questions about the DREs, their concerns about the  
4 DREs, their motivation for bringing the DRE claims.

5 And we would like to work -- we had hoped to reach an  
6 agreement. We could not get an agreement from the State on  
7 that. So we would appreciate help from the Court to the extent  
8 we can, given we have got two more depositions coming up.

9 We're spending a lot of time on that issue -- more  
10 time on that than anything else.

11 MR. MILLER: Your Honor, if I may just address that  
12 briefly because I don't think it is an issue we need to burden  
13 the Court with today.

14 But with respect to the amount of time spent in the  
15 deposition discussing DREs, I would respectfully provide the  
16 caveat that the deposition ended early when Mr. Schoenberg  
17 informed us he needed to go pick up his daughter.

18 Just as a human matter, I was not seeking to frankly  
19 torture Mr. Schoenberg to continue going on longer. So  
20 chronologically we worked through each complaint and, yes,  
21 addressed the issue.

22 But as far as the relevance at this juncture, Mr.  
23 Cross -- excuse me -- not Mr. Cross's complaint -- the Curling  
24 plaintiffs' complaint has with it two counts regarding the DRE  
25 systems, which Your Honor will recall we do believe is moot.

1 But, frankly, Your Honor, we lost that issue.

2 The second set of claims are regarding the BMD issue.  
3 And so we also addressed those claims regarding the deposition  
4 testimony. And, frankly, with respect to both claims, they are  
5 essentially the same claim. The harm as alleged is largely the  
6 same, the verifiability aspect, the risk. All of these are the  
7 same type of claims. And, in fact, the language between the  
8 two complaints hardly changes.

9 So with respect to this issue, Your Honor -- and I  
10 would also note it was after the deposition concluded that we  
11 received the notice from CM/ECF about Curling plaintiffs'  
12 joinder in the severance issue.

13 And respectfully, Your Honor, if we want to address  
14 the DRE topics, I would suggest, Your Honor, with the pending  
15 severance motion from two different sets of plaintiffs, it may  
16 be appropriate to have a status conference in terms of where  
17 those claims are. And we will, of course, respond to them.

18 And we anticipated discussing this with Mr. Cross  
19 today. But, you know, now that we have two different sets of  
20 complaints both seeking severance, we have got some very thick  
21 procedural and jurisdictional issues to work through with this.

22 And I hate to ask it, but we may need to ask for an  
23 extension on the response so that we can adequately respond to  
24 the motion as it pertains to both complaints.

25 THE COURT: Okay. Well, I don't think I'm in a

1 position to -- right now to direct any pulling back on the  
2 questioning about the DREs. I think any witness in this regard  
3 is not deemed an expert witness. They can express their  
4 concerns. And I don't know that it damages their credibility  
5 because they are not Dr. Halderman. I mean, this is -- it  
6 is -- but on the other hand, it could be a waste of time. And  
7 I recognize that.

8 And -- but I think almost all of the plaintiffs sat  
9 through a lot of these hearings and are relatively informed.  
10 So I'm not sure it makes a difference one way or the other.  
11 But it does seem like a waste of time potentially.

12 I would be happy to have a hearing once I'm through  
13 with the -- with this trial. The trial may last a week and two  
14 days or so. So it will go all -- supposedly according to the  
15 Government it will go all next week into the following week.  
16 But I don't know how long precisely.

17 If you -- and, of course, if the State needs an  
18 extension, you just ask for a reasonable extension and it will  
19 be granted. You-all can speak today about what you think you  
20 need and what sort of -- what sort of time, if any, that the  
21 plaintiffs are going to need for a reply. And there is no  
22 point in my having the hearing until I have gotten the brief so  
23 I understand what all the issues are.

24 MR. CROSS: Thank you, Your Honor.

25 MR. MILLER: Yes, Your Honor. I understand that. I

1 just wanted to essentially raise the issue for sure.

2 THE COURT: But I would say, you know, I can't  
3 conceive -- I have no idea whether half the -- if it was true  
4 that it was half the deposition and he had to go pick up his  
5 daughter and let's say that was 3:00, it still would be a good  
6 number of hours.

7 So I'm not sure how much that really is helpful to  
8 the defendants. But, you know, it is your business in the end.

9 All right. I'll look for your filings. And we'll  
10 hopefully get you something by Monday with any luck. But the  
11 beginning of the trial is always demanding. So we'll see.

12 MR. CROSS: Thank you, Your Honor.

13 THE COURT: All right. Very good.

14 MR. MILLER: Thank you, Your Honor.

15 THE COURT: Take care. Bye-bye.

16 (The proceedings were thereby concluded at 4:59  
17 P.M.)

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## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 35 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 21st day of October, 2021.



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SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
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